UT 00-3
Tax Type: Use Tax
Issue: Interim Use Exemption
Taxpayer's Bill of Rights

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

"DUNHILL" EQUIPMENT & SUPPLY CO.,	)	Docket No. 98-ST-0000
"ABC"SERVICES, INC.,	)	Reg. Nos. 0000-0000
Taxpayers	)	0000-0000
v.	)	
THE DEPARTMENT OF REVENUE	)	John E. White,
OF THE STATE OF ILLINOIS	)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Thomas Donohoe, McDermott, Will & Emery, for "Dunhill" Equipment & Supply Co., and "ABC" Services, Inc. Mark Dyckman, Special Assistant Attorney General, for the Illinois Department of Revenue.

Synopsis:

The Illinois Department of Revenue ("Department") issued two Notices of Tentative Denial of Claim ("denials") in response to amended returns filed by "Dunhill" Equipment & Supply Co. ("Dunhill" or "taxpayer") and by "ABC"Services, Inc. ("ABC").[1] Taxpayers filed those returns to seek credit for use tax "Dunhill" paid regarding its purchases and use of tangible personal property during the period from 4/1/91 through 12/31/95. Taxpayers protested those denials, and requested a hearing.

Pursuant to a pre-hearing order, the parties agreed that the issue to be resolved was whether "Dunhill's" purchases of certain tangible personal property were exempt from Illinois use tax under the demonstration or interim use exclusion contained in the

[1] For administrative convenience, I will refer to both taxpayers as "Dunhill".

Use Tax Act ("UTA"), 35 **ILCS** 105/2. At hearing, the parties agreed that an additional issue was whether taxpayer's claims should be granted pursuant to the Taxpayers' Bill of Rights Act ("TBRA"). 20 **ILCS** 2520/1 *et seq.* I have considered the evidence adduced at hearing, and I am including in this recommendation findings of fact and conclusions of law. I recommend the first issue, whether the purchases were exempt from use tax, be resolved in favor of the Department. I recommend that the second issue, whether taxpayer is entitled to relief under the TBRA, be resolved in favor of taxpayer.

Findings of Fact:

Facts Regarding "Dunhill" & ABC's" Business and its Treatment of the Equipment Purchased for Use in its Rental Fleet

1. "Dunhill" rents and sells construction equipment in four cities in Illinois, and it has a divisional headquarters in "Someplace", Illinois. *See* Department Exs. 1 (copies of the Denials), 6 (copies of audit workpapers prepared regarding the Department's audit of claims filed following the Department's audit of taxpayer for 7/88 through 3/91); Taxpayer Ex. 1.

2. In April 1991, "Dunhill" became a wholly owned subsidiary of "ABC". Department Ex. 6, p. 4.

3. Because of the new ownership, "Dunhill" obtained a new registration number, but continued doing business as "Dunhill". *See* Department Exs. 5 (1996-97 Yellow Pages ad for "Dunhill"), 6; Taxpayer Ex. 7, p. 16 (amended return for 4/91 shows a new registration number).

4. "Dunhill's" principal activities consist of the rental and sale of construction equipment. Hearing Transcript ("Tr.") p. 27 (testimony of "Bruce Wayne" ("Wayne"), "Dunhill's" chief financial officer).

5. Roughly half of taxpayer's revenues came from renting equipment to others; the other half came from selling construction equipment and parts, and sales of service to others at retail. Taxpayer Ex. 1, p. 1; Taxpayer Ex. 2, ¶¶ 1-2; Tr. pp. 37-38 ("Wayne"); *see also* Department Ex. 2.

6. "Dunhill" did not pay use tax to its vendors when it purchased the tangible personal property it rented or the property it sold at retail. *See* Taxpayer Ex. 2; Tr. p. 36 ("Wayne").

7. Consistent with § 167 of the Internal Revenue Code ("the Code"), pertinent Treasury Regulations, and generally accepted accounting principles, "Dunhill" does not claim a deduction for depreciation of the items of construction equipment that it purchases and carries as part of its inventory of goods for sale to others at retail hereinafter, "Dunhill's" "sales inventory"). *See* Tr. p. 62 (testimony of "Dan Marino" ("Marino"), a KPMG audit partner assigned to "Dunhill's" account); 26 U.S.C. § 167; 26 C.F.R. § 1.167(a)-(1) & (a)-2.

8. There was no evidence offered to show that, during the claim period, "Dunhill" rented any of the items of construction equipment carried as its sales inventory.

9. "Dunhill" subjects its rental equipment to wear and tear when an item is placed in service[2] as part of "Dunhill's" rental fleet, and it claims a deduction for

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[2] The phrase "placed in service" is a term used in former § 46 of the Code, and the Illinois General Assembly has expressly incorporated the Code's definition of the term within the Illinois Income Tax Act. 35 **ILCS** 5/201(e)(6), (f)(5), (h)(5). While the definition is no longer part of current § 46 of the Code, the term itself remains defined within Treasury Regulations promulgated to administer § 167 of the Code, which provides a reasonable allowance for depreciation of eligible property. For example, Treasury Regulation § 1.167(a)-11(e) provides, in pertinent part:

> *** Property is first placed in service when first placed in a condition or state of readiness and availability for a specifically assigned function, whether in a trade or business, in the

depreciation of any such property on its federal tax forms. Department Ex. 6, p. 7; Tr. p. 63 ("Marino"). "Dunhill" did not take the deduction for depreciation by mistake; it intended to take the depreciation deduction for the equipment placed in service within its rental fleet. Department Ex. 6, p. 7; Tr. p. 63 ("Marino").

10. "Dunhill" uses written rental contracts when it rents an item of construction equipment from its rental fleet. *See* Department Ex. 4, p. 2.

11. "Dunhill's" contracts grant "Dunhill" the right to retake possession of an item of equipment being rented, but only upon the lessee's default. Department Ex. 4, p. 2 (¶ 7 (Default)). The agreements do not mention, and therefore, do not grant "Dunhill" the right to retake possession of an item of equipment being rented in the event someone other than the renter wants to buy it. *See id*.

12. "Dunhill" maintains a card for each item of equipment in its rental fleet. Department Ex. 6, p. 7. That card reflects: the date "Dunhill" purchased the item of equipment; "Dunhill's" cost of the equipment; the vendor of the equipment; the date "Dunhill" placed the item into service as part of its rental fleet; and the branch at which the item was placed in service. Department Ex. 6, p. 7.

13. If a customer purchases an item of equipment it has rented from "Dunhill", "Dunhill" will give the customer credit for the prior rental payments against its sales price for the item. Taxpayer Ex. 1, pp. 4, 6, 8, 10 (account no. 6545-0000).

14. "Dunhill" introduced no contracts demonstrating that a particular item of

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> production of income, in a tax-exempt activity, or in a personal activity. In general, the provisions of paragraph (d)(1)(ii) and (d)(2) of § 1.46-3 shall apply for the purpose of determining the date on which property is placed in service ….

26 C.F.R. § 1.167(a)-11(e); *see also*, Sealy Power, Ltd. v. C.I.R., 46 F.3d 382, 393-98 (5th Cir. 1995) (discussing the meaning of "placed in service").

equipment was rented as a demonstrator for the equipment "Dunhill" carried as part of its sales inventory.

15. "Dunhill" introduced no evidence to show that any item of equipment purchased during the claim period and placed in service within its rental fleet was sold within one year of the purchase date.

Facts Regarding the Department's Past Written Advice To, & the Department's Prior Audits Of, "Dunhill"

16. In 1981, "Dunhill" asked for and received a private letter ruling from the Department. Taxpayer Exs. 2-3.

17. As part of its 1981 request for a private ruling letter, "Dunhill" made the following representations to the Department:

> 1. "Dunhill" is in the business and functions as a distributor of construction equipment. It handles items related to the use of the construction industry, including air compressors, high reach equipment, concrete equipment, electric tools, scaffolding, pumps, etc.
> 2. Taxpayer represents manufacturers as a distributor and its function as a distributor is to obtain a reasonable market share for the manufacturer's equipment and included in the functions of the distributor are not only sales, but also the inventory of parts and equipment and servicing equipment along with other allied services carried with this sales organization.
> 3. In addition, the taxpayer carries on a rental operation of the equipment it sells, one of the purposes of which is to increase the sale of the product through demonstration and interim use as well as provide a source of income to the business.
> 4. All items of equipment in rental inventory including items out on lease or rent, are subject to sale to the lessee or individual renting the equipment and/or any potential customer of the taxpayer.
> 5. Lessees or individuals renting the equipment are allowed a percentage of the rental payments as a credit against the purchase price of the equipment.
> 6. For Federal Income tax purposes, the company takes

depreciation and investment credit on items placed in the rental inventory if said items are still in the rental inventory at the end of the company's fiscal year.

7. With respect to the assessment of use tax, the company would pay a use tax on all items that remained in its rental inventory at the end of an 18-month period, which 18-month period is the time length set forth in the department's bulletin DX-7. The company wishes to rely on the 18-month period of time as a 'safe harbor'. in some cases, the company might file a claim for refund, if an item was sold out of rental inventory even after the 18-month period if it felt that the particular transaction qualified for an interim use or demonstrator use exemption.

Taxpayer Ex. 2; *see also* Tr. pp. 37-38 ("Wayne", testifying that the facts set out in the 1981 letter accurately described "Dunhill's" business in 1981 and currently).

18. In response to "Dunhill's" request for advice, the Department notified "Dunhill" that:

* * * *

Based upon the facts stated in paragraphs 1 through 6 above, the Department concurs with the proposal stated in paragraph 7 above. Claims filed for items sold out of rental inventory after the 18-month period which the company believes qualify for the interim or demonstrator use should be well documented.

* * * *

Taxpayer Ex. 3, p. 2.

19. Because of that private ruling letter, "Dunhill" began self-assessing use tax on rental equipment remaining within its rental fleet for more than 18 months. Department Ex. 6, pp. 5-6; Tr. pp. 36-37, 48-49 ("Wayne"). That is, on the sales and use tax return "Dunhill" filed regarding the 19th month after it purchased an item of construction equipment and placed it into service as part of its rental fleet,

"Dunhill" self-assessed and paid use tax, based on its cost price of the item. Department Ex. 6, pp. 5-6; Tr. pp. 36-37 ("Wayne").

The Department's Audit of "Dunhill" For the Period From 7/88 Through 3/91

20. At or about the time taxpayer was purchased by ABC", the Department initiated an audit of taxpayer's business for the period beginning July 1, 1988 through March 31, 1991. *See* Department Ex. 6, p. 4; Taxpayer Ex. 8 (auditor's comments describing the Department's audit of taxpayer for 7/88 through 3/91). Charles "Auditor" conducted that audit. Taxpayer Ex. 8; Department Ex. 6, p. 4.

21. During the course of that audit, "Auditor" notified "Dunhill" that the 18-month safe harbor rule was no longer in effect. Taxpayer Ex. 8, p. 2; Tr. pp. 38-39 ("Wayne"); *see also* Department Information Bulletin No. 86-54.

22. The audit conducted by "Auditor" included submitting a list of questions to "Dunhill" that had been prepared by the Department's technical support unit. Department Ex. 6, p. 6; Taxpayer Ex. 4 (April 24, 1992 letter from "Audit Supervisor" to "Wayne").

23. Based on "Dunhill's responses to those questions, "Auditor" was advised by his supervisor that "Dunhill's purchases of equipment for rental qualified as an interim use of that property, and "Auditor" concluded the audit by finding that "Dunhill" had erroneously paid use tax on such items. Department Ex. 6, p. 6; Taxpayer Ex. 8, p. 2.

24. The Department's audit of "Dunhill" for 7/88 to 3/91 was concluded on or about July, 1992. *See* Taxpayer Ex. 8, p 2 (dated July 28, 1992).

25. Just before the audit was concluded, "Wayne", on "Dunhill's behalf, wrote a letter

to the Department auditor's supervisor. Taxpayer Ex. 5. In that letter, "Wayne" wrote, in relevant part:

> Based upon our discussion of last week, "Dunhill's" accepts the Department's interpretation as follows:
>
> As "Dunhill" indicated, essentially all rental tools & supplies costing under $1000 are normally used until discarded due to wear and tear. These items are subject to Use Tax at the time of purchase. Should any of this equipment be subsequently sold, "Dunhill" may take a credit against the Retail Occupational Tax to the extent of the Use Tax previously paid when the equipment was acquired.
>
> Rental equipment costing greater than $1000 is held for sale at all times it is being rented. The interim use exemption will apply to this equipment. Tax will be charged on the selling price when the sale takes place.
>
> If any rental equipment is lost or damaged during the rental period, the customer must purchase the item at its retail selling price and ROT is charged at that time.
>
> Regarding the current audit, "Dunhill" may file for a credit to the extent of the Use Tax paid. The waiver of statute of limitations is waived through September 30, 1992.

Taxpayer Ex. 5.

26. In response to "Wayne's" letter, "Audit Supervisor" wrote back to "Wayne" and said:

> Based upon the information provided in your letter, we conclude that a vast amount of purchases on which use tax has been paid to the Department would qualify for interim/demonstration use.
>
> I have enclosed a copy of our regulations concerning claims for credits for your information, along with ST-1-X and RCR-101. I will advise Revenue Auditor Charles "Auditor" to submit the audit.

Taxpayer Ex. 6. "Audit Supervisor" included amended sales and use tax return forms in that letter to "Wayne". *See id.*

27. At the conclusion of that audit, "Auditor" "… concluded that … ["Dunhill"] was overpaid and submitted the audit as a no liability audit and informed the Taxpayer to file the claims for credit." Department Ex. 6, p. 2; Taxpayer Ex. 8, p. 2.

28. After it received the letter from "Audit Supervisor", "Dunhill" stopped self-assessing use tax on the items of equipment remaining in its rental fleet after 18 months. Tr. pp. 48-49 ("Wayne").

The Department's Audit of "Dunhill's" Amended Returns/Claims for Refund Filed Regarding 7/88 - 3/91

29. "Dunhill" filed claims for refund following the Department audit for the 1988-1991 period. *See* Department Ex. 6, *passim*. The total amount "Dunhill" sought in those amended returns amounted to approximately $700,000. Tr. pp. 50 ("Wayne"), 69 ("Auditor 2").

30. The Department conducted an audit of those amended returns, pursuant to § 20 of the UTA. 35 **ILCS** 105/20; Department Ex. 6. "Auditor 2" conducted that audit. Department Ex. 6; Tr. pp. 46 ("Wayne"), 68 ("Auditor 2"). "Auditor 2's" audit comments describe how the audit was conducted, as well as the results of the Department's audit of "Dunhill's" claims. Department Ex. 6, pp. 4-9 ("Auditor 2's" audit comments).

31. During the course of that audit, "Auditor 2" conducted a review of "Dunhill's" rental cards. Department Ex. 6, p. 7.

32. During his review of a sample of "Dunhill's" rental cards, "Auditor 2" observed that:

- an item of equipment was transferred into "Dunhill's" rental fleet, on average, within two days of its purchase. Department Ex. 6, p. 7.

- once an item of construction equipment was placed in service in "Dunhill's" rental fleet, it remained there, on average, for approximately 5 years before it was sold. *Id*., pp. 7-8.

- over 70% of the items of equipment sampled were still in "Dunhill's" rental fleet, or had been scrapped by "Dunhill". *Id*., p. 8.

- "[i]f a rental inventory item was sold, ["Dunhill"] reported it as a capital gain or loss. These transactions were not reported like regular sales of equipment." *Id*.

33. "Auditor 2" met with "Wayne" during the course of that audit, and to inform him of the results of that audit. Department Ex. 6, pp. 7, 9; Tr. pp. 46 ("Wayne"), 69-70 ("Auditor 2").

34. In his audit comments, "Auditor 2" wrote, "In conversations with Mr. Bruce "Wayne", Controller, he also stated that they knew the equipment was being purchased for rental purposes at the time of purchase." Department Ex. 6, p. 8.

35. At the closing conference held to discuss the audit conclusions, "Auditor 2" notified "Wayne" that the Department had determined that "Dunhill" was not entitled to the interim use exemption for the items "Dunhill" purchased and placed in service in its rental fleet. Department Ex. 6, p. 9; Tr. pp. 72-73 ("Auditor 2"); *but see id*., pp. 46 ("Wayne").

36. After being presented with the Department's auditor-prepared report, "Wayne" signed that report on "Dunhill's" behalf. Department Ex. 6, p. 1. At or about the time "Wayne" signed that auditor–prepared report, "Wayne" also withdrew "Dunhill's" amended returns. Department Ex. 6, pp. 1-3.

37. The Department's audit report, which "Wayne" signed on "Dunhill's" behalf, reflected that only $23,169 of the $162,972 refunded by the Department was a refund of use tax. Department Ex. 6, p. 1 (lines 6a-6b, 24).

38. The $23,169 in use tax refunded was not based on the Department's determination that "Dunhill" was entitled to the interim use exemption regarding any item of equipment purchased during the claim period and placed in service in "Dunhill's" rental fleet. Department Ex. 6, pp. 8-9.

39. Instead, the $23,169 refund of use tax was granted because the auditor determined that, during the period when it was still self-assessing use tax on the items remaining in its rental fleet after 18 months, "Dunhill" had mistakenly self-assessed its use tax liability using a purchase price that included the amount of freight "Dunhill's" vendors charged for transporting the equipment to "Dunhill". Department Ex. 6, p. 8; Tr. p. 69 ("Auditor 2"). The auditor's correction of that error yielded the $23,169 use tax refund. Department Ex. 6, pp. 1, 8; Tr. p. 69 ("Auditor 2").

40. Most of the amounts of tax credited or refunded as a result of the audit of "Dunhill's" claims for the period from 7/88 – 3/91 consisted of the deductions from the amount of ROT "Dunhill" charged when selling the equipment that had been used, on average, for approximately 5 years, within "Dunhill's" rental fleet. Department Ex. 6, p. 9; Tr. p. 83 ("Auditor 2"); *see also*, Department Information Bulletin No. 86-54.

41. On October 17, 1994, "Dunhill" received written notice, in the form of "Auditor 2's" auditor-prepared return and the schedules prepared to support that return, that the Department determined that "Dunhill" was not entitled to the interim use exemption regarding the equipment "Dunhill" purchased for use in its rental fleet. Department Ex. 6, pp. 1-3, 9; Tr. pp. 107-08 ("Auditor 2").

Facts Regarding the Department's Audit of "Dunhill's" Business For the Period Beginning 4/91 Through 12/95

42. The Department next conducted an audit of "Dunhill's" business for the period beginning 4/1/91 through 12/31/95. Tr. pp. 68-74 ("Auditor 2"); Department's Post-Hearing Brief, p. 3. "Auditor 2" also conducted that audit. Tr. p. 68 ("Auditor 2").

43. During his audit, "Auditor 2" reviewed, *inter alia*: (1) "Dunhill's" comparative revenues from selling construction equipment and from renting construction equipment; (2) the average time an item was available for rental; (3) the number of times an item was rented; (4) the items claimed to be exempt were depreciated as part of "Dunhill's" fleet of rental units; and (5) "Dunhill" held itself out as being engaged in the business of renting construction equipment. Tr. pp. 73-75, 83 ("Auditor 2"); Department Exs. 2, 5; Taxpayer Exs. 1-2; Tr. pp. 37-38 ("Wayne").

44. The equipment "Dunhill" purchased during the 4/91 to 12/95 audit period and placed in service in its rental fleet remained there, on average, for 43 months. Tr. p. 83 ("Auditor 2").

45. For the period from 4/1/91 to 3/31/92, and without taking into account the different service charges "Dunhill" might have charged its rental customers, "Dunhill" earned $7,151,922 from renting the equipment in its rental fleet, and $744,510 from selling equipment from its rental fleet. *Compare* Taxpayer Ex. 1, p. 3 (the sum of all but the bottom five accounts listed on Taxpayer Ex. 1, p. 3,

minus the $26,447 credit for the same period)[3] *with id*., p. 4 (the sum of account nos. 6540-0000, 6540-0010 & 6545-0000).

46. During the period from 4/1/92 to 3/31/93, "Dunhill" earned $6,641,700 from renting the equipment in its rental fleet, and $271,200 from selling its rental equipment. *Compare* Taxpayer Ex. 1, p. 5 (the sum of all but the last five accounts listed on Taxpayer Ex. 1, p. 5, minus the $4,900 credit for the same period)) *with id*., p. 6 (the sum of account nos. 6540-0000 & 6545-0000).

47. For 4/1/93 through 3/31/94, "Dunhill" earned $6,929,000 in rental revenues, and $705,400 from selling its rental equipment. *Compare* Taxpayer Ex. 1, p. 7 (the sum of all but the last five accounts listed on Taxpayer Ex. 1, p. 7, minus the $37,000 credit for the same period)) *with id*. p. 8 (the sum of account nos. 6540-0000, 6545-0000).

48. For 4/1/94 through 3/31/95, "Dunhill" earned $8,549,000 in rental revenues, and $535,600 from selling rental equipment. *Compare* Taxpayer Ex. 1, p. 9 (the sum of all but the last six accounts listed on Taxpayer Ex. 1, p. 7, minus the $2,000 credit for the same period)) *with id*. p. 10 (the sum of account nos. 6540-0000, 6540-2100, 6540-2110, 6540-2120 & 6545-0000).

49. For the period from 4/1/95 through the end of the claim period, 12/31/95,

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[3] For purposes of the revenue comparisons made in finding of fact numbers 45-49, I am only counting the amount of money "Dunhill" earned from renting equipment and the amount of money it earned from selling such equipment. Thus, I am not including within my statement of "Dunhill's" rental revenues the amounts "Dunhill" charged or accounted for under the headings of: Cartage; Gasoline & Diesel; Major & Minor Damage Beyond Repair; Erection & Dismantling; Damage Waiver Fees; Rentals-Other Revenue; or Rerent Income-Other – even though "Dunhill" itself has accounted for such amounts as "Rental Revenues". Taxpayer Ex. pp. 3, 5, 7, 9, 11. I am also treating any rental credits "Dunhill" reported under account no. 6545-0000 as being part of "Dunhill's" sales revenues, and I have subtracted such amounts from my

"Dunhill" earned rental revenues in the amount of $8,110,560, and $656,016 from selling the equipment in its rental fleet. *Compare* Taxpayer Ex. 1, p. 11 (the sum of all but the last six accounts listed on Taxpayer Ex. 1, p. 11) *with id*. p. 12 (the sum of account nos. 6540-2100, 6540-2110 & 6540-2120).

50. During that audit, "Auditor 2" again determined that "Dunhill" was not entitled to the interim use exemption regarding its purchases of equipment it placed in service in its rental fleet. Tr. pp. 73-74 ("Auditor 2").

51. "Dunhill" paid the audit liability, and thereafter, filed the amended returns at issue here. Tr. pp. 48 ("Wayne"); 73-74 ("Auditor 2"); Department Ex. 1.

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statement of "Dunhill's" rental revenues for the same period. In other words, I am viewing "Dunhill's" summary of its books and records in a light most favorable to "Dunhill".

Conclusions of Law:

This matter involves the interplay of the Retailers' Occupation Tax Act ("ROTA") and the Use Tax Act ("UTA") as they pertain to a person whose business includes both selling and renting tangible personal property in Illinois.

The UTA imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail from a retailer …." 35 **ILCS** 105/3. The General Assembly defined certain terms used within the UTA in § 2 of that act. 35 **ILCS** 105/2. It defined "use" as:

> the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of such property in any form as tangible personal property in the regular course of business to the extent that such property is not first subjected to the use for which it was purchased, and does not include the use of such property by its owner for demonstration purposes. … "Use" does not mean the demonstration use or interim use of tangible personal property by a retailer before he sells that tangible personal property. ***

35 **ILCS** 105/2.

The legislature defined "retailer" as "every person engaged in the business of making sales at retail as defined in this Section." *Id.* The UTA's definition of a "sale at retail" is consistent with the ROTA's definition of the same term. *Compare* 35 **ILCS** 105/2 *with* 35 **ILCS** 120/1. A person engaged in the business of leasing or renting tangible personal property to others in Illinois is the legal "user" of the property it purchases and makes available for lease in Illinois. Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 310-11, 347 N.E.2d 729, 731 (1965). The right or power exercised by a lessor incident to its ownership of the property it leases "is the right or power to lease the

property in an attempt to make a profit." *Id.*, 63 Ill. 2d at 310, 347 N.E.2d at 731 (*citing* Philco Corp. v. Department of Revenue, 40 Ill. 2d 312, 239 N.E.2d 805 (1968)).

Section 20 of the UTA provides, in pertinent part:

> As soon as practicable after a claim for credit or refund is filed, the Department shall examine the same and determine the amount of credit or refund to which the claimant or the claimant's legal representative, in the event that the claimant shall have died or become a person under legal disability, is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his or her legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein. ***
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> * * * *

35 **ILCS** 105/20.

Here, the *prima facie* correctness of the Department's action in this matter was established when the Department introduced its denials of "Dunhill's" claims under the certification of the Director. 35 **ILCS** 105/20. The Department's *prima facie* case is overcome, and the burden shifts back to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and identified with its books and records, to show that the Department's determinations are wrong. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156-57, 242 N.E.2d 205, 206-07 (1968); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832, 527 N.E.2d 1048, 1052 (1st Dist. 1988).

Issue 1: Whether "Dunhill" is Entitled to the Interim Use Exemption for Its Purchases of Equipment, During the Months of 4/91 Through 12/95, for Use in Its Rental Fleet

"Dunhill" asserts that it is primarily a retailer "that purchased all equipment with the eventual intent to resell it." Taxpayer's Post-Trial Brief ("Dunhill's" Brief"), p. 4. "Dunhill's" use of the word "eventual" is telling, because use tax is not determined by a purchaser's eventual plans for tangible personal property, but rather, it is determined by the purchaser's actual "exercise … of any right or power over tangible personal property incident to the ownership of that property, except that it does not include the sale of such property … in the regular course of business to the extent that such property is not first subjected to a use for which it was purchased …." 35 **ILCS** 105/2. And while "[u]se does not mean the demonstration use or interim use of tangible personal property by a retailer before he sells that tangible personal property" (*id*.), the issue posed by this case, and the resolution of which must be guided by the whole definition of "use," is whether "Dunhill" used the items of equipment by making them available for rental to others in Illinois, or whether "Dunhill" purchased such items, not to rent to others, but merely subjected such items to an interim or demonstration use before it sold them in the normal course of its business as a retailer. 35 **ILCS** 105/2.

While one component of "Dunhill's" business includes retailing, another major component is its rental operation. Taxpayer Ex. 2; Tr. pp. 27, 37-38 ("Wayne"); "Dunhill's" Brief, p. 1. The Department specifically asserts that "Dunhill" is not "primarily" a retailer of the property at issue. Department's Post-Hearing Brief ("Department's Brief"), pp. 11 ("Taxpayer's Intent Was To Rent Not Sell The Equipment At Issue"), 12 ("Taxpayer Was Primarily A Lessor Of The Equipment At Issue In This

Matter, Thus It Does Not Qualify For The Interim Use Exclusion."). I agree, for the following reasons.

The apparent dilemma caused by § 2 of the UTA as applied to persons whose regular business operations include both renting and selling tangible personal property is that a retailer's interim or demonstration use of the property it purchases for resale to others is not subject to use tax, but tangible personal property purchased by a person for use in the person's business of renting or leasing such property to others in Illinois is subject to use tax. *Compare* Illinois Road Equipment Co. v. Department of Revenue, 32 Ill. 2d 576, 207 N.E.2d 425 (1965) *with* Telco Leasing, Inc., 63 Ill. 2d at 310-11, 347 N.E.2d at 731. "Dunhill" argues that, to be subject to an interim use exclusion, the Department's use tax regulation § 150.306 (hereinafter "rule 306") "requires that a taxpayer be engaging in business 'primarily' as a retailer." "Dunhill's" Brief, p. 7. Actually, it requires somewhat more. What rule 306(a) states, in pertinent part, is:

> a) Interim Use Exemption
>
> 1) Tangible personal property purchased by a retailer for resale, and used by the retailer or his agents prior to its ultimate sale at retail, is exempt from Use Tax, provided that the tangible personal property is carried as inventory on the books of the retailer or is otherwise available for sale during the interim use period.
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> 2) The leasing of tangible personal property by persons who are primarily engaged in the business of selling such property at retail is within the interim use exemption if such property is carried as inventory on the books of the retailer or is otherwise available for sale during the lease period. The interim use exemption is not available to persons who purchase tangible personal property with the intent to engage in the business of leasing such property and who sell such property only as an incident to their leasing activity. ***

86 Ill. Admin. Code § 150.306(a).

As used in the first sentence of rule 306(a)(2), the term "primarily" does not modify the phrase "persons who are engaged in the business of selling property at retail." Instead, it modifies the phrase "… persons who are … engaged in the business of selling *such property* at retail …." *Id*. (emphasis added). In turn, the term "such property" refers to the property that is being leased by the retailer. The factual question begged by the first sentence in 306(a)(2), therefore, is whether "Dunhill" is primarily engaged in the business of selling the items it purchased for use, and used, in its rental fleet. Rule 306(a)(2), moreover, has more than just one sentence. In the second sentence of rule 306(a)(2), the term "such property" is used to describe property that is purchased by "… persons … with the intent to engage in the business of leasing … and who sell … [it] only as an incident to their leasing activity." *Id*. Thus, in both sentences of rule 306(a)(2), "such property" refers to leased property that either is or is not subject to the exemption from use tax.

In that respect, the first sentence of use tax rule 306(a)(2) reflects the Illinois General Assembly's intent, as expressed in § 2 of the UTA, that a retailer not be assessed use tax on the property it purchases and subjects to a demonstration or interim use that is a mere incident to the retailers' activity of carrying such property as part of the inventory of goods that are available for sale to others. 35 **ILCS** 105/2 (since "use" does not include "… the sale of such property … in the regular course of business *to the extent that such property is not first subjected to the use for which it was purchased …*.") (emphasis added); Illinois Road Equipment Co. v. Department of Revenue, 32 Ill. 2d 576, 207 N.E.2d 425 (1965). The second sentence of rule 306(a)(2) reflects the Illinois

supreme court's interpretation of "use" as it is applicable to persons who purchase tangible personal property for use in Illinois in a business that includes making such property available for lease or rental to others. Telco Leasing, Inc., 63 Ill. 2d at 310-11, 347 N.E.2d at 731; Philco Corp., 40 Ill. 2d at 317, 239 N.E.2d at 809; *see also*, Howard Worthington, Inc. v. Department of Revenue, 96 Ill. App. 3d 1132, 421 N.E.2d 1030 (2d Dist. 1981).

Where a taxpayer's regular business operations include both selling and renting tangible personal property, therefore, it is almost imperative that the fact-finder focus his inquiry on whether the taxpayer is primarily a retailer or primarily a user of the specific property claimed to be exempt. To put it another way, § 2 of the UTA, and use tax rule 306(a)(2) both support a conclusion that an interim use question should be resolved by determining whether a taxpayer is, in fact, using property claimed to be exempt more like a retailer would, or more like a non-exempt user of such property would.

Here, "Dunhill" does not dispute that its "… business has two components." "Dunhill's" Brief, p. 1. It both rents and sells construction equipment. Taxpayer Exs. 1-2; Tr. p. 27 ("Wayne"). Nor is there any dispute that the only items of property for which "Dunhill" claims a refund are the items of equipment "Dunhill" purchased during the claim period and, immediately thereafter (*see* Department Ex. 6, p. 7), placed in service within its rental fleet. *See* Pre-Hearing Order (setting forth the issue to be resolved at hearing). Since the record shows that "Dunhill's" business includes both selling and renting equipment, its claims should be granted if, in fact, "Dunhill" subjected the property at issue to an interim or demonstration use that was a mere incident to its holding such property as part of its sales in the normal course of its retailing operations,

but not if, in fact, "Dunhill" purchased the equipment at issue for use in its rental operations, and sold such property only as an incident to its rental operations. 35 **ILCS** 105/2; 86 Ill. Admin. Code § 150.306(a)(2).

In Illinois Road Equipment Co. v. Department of Revenue, 32 Ill. 2d 576, 207 N.E.2d 425 (1965), the Illinois supreme court affirmed an Illinois circuit court's conclusion that a retailer's rental of construction equipment did not subject the retailer to use tax on the equipment purchased and rented to others. In that case, however, Illinois Road Equipment Co. "retained no machinery for the primary purpose of rental, and … during the years … involved the amount of rent received averaged less than one percent of plaintiff's annual gross income." *Id*. 32 Ill. 2d at 578, 207 N.E.2d at 426. Moreover, "[a]t all times that any machine was rented out it remained in plaintiff's inventory of goods for sale …." *Id.* The Illinois supreme court affirmed the circuit court's reversal of the Department's use tax assessment in Illinois Road Equipment because "[t]he evidence established that the act of renting machinery was in each case simply a method used by [taxpayers] to demonstrate and promote the sale of the machinery *and was not a separate and distinct enterprise from the business of selling the machinery at retail*." Illinois Road Equipment Co., 32 Ill. 2d at 580, 207 N.E.2d at 427 (emphasis added).

Here, in contrast, the facts adduced at hearing clearly establish that "Dunhill's" rental operation was an enterprise that was distinct and separate from (or at least, an enterprise that was more than a mere incident to) "Dunhill's" status as a manufacturers' representative, and the retailing portion of its business. Taxpayer Exs. 1-2; Department Ex. 6, pp. 4-10. For example, Illinois Road Equipment carried all of the equipment it rented as part of its sales inventory. *See* Illinois Road Equipment Co., 32 Ill. 2d at 578,

207 N.E.2d at 426. But not "Dunhill". It maintained an entire fleet of different kinds of rental equipment, in addition to the items of construction equipment that it carried within its sales inventory. Taxpayer Ex. 1, pp. 3, 5, 7, 9, 11; *see also,* Department Ex. 6, p. 7 ("Dunhill's" rental fleet included over 1,000 items). And unlike the facts in Illinois Road Equipment, "Dunhill" did not earn an incidental amount of revenue by renting construction equipment. Even if one prefers "Dunhill's" interpretation of its books and records over the Department's interpretation, "Dunhill's" own exhibit shows that almost half of its revenue came from renting the different lines of equipment placed in service within its rental fleet. Taxpayer Ex. 1, pp. 1, 3, 5, 7, 9, 11. Finally, the word "interim" means "for or during an interim; temporary; provisional [an *interim* council]." Webster's New World Dictionary 734 (2d College Ed.) (1978). Yet "Dunhill" kept the items in its rental fleet for, on average, 43 months during the period at issue. Tr. pp. 83-84 ("Auditor 2").

Contrary to "Dunhill's" argument, there was absolutely no documentary evidence offered to support a conclusion that ""Dunhill's" equipment rentals are an incidental part of its retail business intended both to encourage sales and to provide additional revenue." "Dunhill's" Brief, p. 8. In fact, "Dunhill" did not identify a single item of equipment that it purchased during the claim period, placed in service within its rental fleet, and which it thereafter sold during the claim period as a result of its rental of that item.[4] If "one of the

[4] And even if it had, such evidence would have tended to show only that the specific item might have been subject to the interim use exemption, not the entire rental fleet. Recall that "Dunhill" immediately placed the items of equipment into service in its rental fleet and kept them there, on average, for 43 months. Tr. pp. 83-84 ("Auditor 2"); *see also,* Department Ex. 6, p. 7. That "Dunhill" kept items in its rental fleet for 3 to 4 years tends to show that, even if "Dunhill" might have occasionally sold an item of rental equipment after renting it (*see, e.g.*, Taxpayer Ex. 1, p. 3), the statutory presumption still warrants a conclusion that "Dunhill" had, more likely than not, already "used" any particular item by previously making it available for rental to others. 35

purposes [of "Dunhill's" rental operation] … [wa]s to increase the sale of the product through demonstration and interim use …." (*see* Taxpayer Ex. 2), "Dunhill" should have been able to identify at least one sale of an item of construction equipment carried within its sales inventory that was made as a result of a demonstration lease of an item from its rental fleet. Yet here, "Dunhill" offered no documentary evidence whatever to support the truth of the claim it first made in 1981, and essentially repeated at this hearing. Taxpayer Ex. 2; Tr. pp. 37-38 ("Wayne"); "Dunhill's" Brief, p. 8. Again, the documentary evidence shows that, even if "… one of the purposes of …" "Dunhill's" rental enterprise was to promote the sale of its sales inventory (*see* Taxpayer Ex. 2 (¶ 3)), that purpose was incidental and subordinate to "Dunhill's" primary purpose of making a profit by making such property available for rental to others.

Another way to gauge whether "Dunhill" subjected the property at issue to a demonstration or interim use or whether it used the property in its rental operations is to compare the amount of revenue it received from renting the items in its rental fleet with the amount it received from selling "such property." *See* 86 Ill. Admin. Code § 150.306(a)(2). "Dunhill's" Exhibit No. 1 shows that, during the entire claim period, "Dunhill" had $41,594,579 in what it calls rental revenues, and $2,911,726 from selling the different items of equipment in its rental fleet. *Compare* Taxpayer Ex. 1, pp. 3, 5, 7, 9, 11 *with id.*, pp. 4, 6, 8, 10, 12 (entries regarding revenues from selling rental equipment). If one eliminates all of the amounts "Dunhill" charged customers for the

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ILCS 120/7 ("*** It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable. ***"); 35 **ILCS** 105/12 (§ 7 of the ROTA is incorporated into the UTA). That is, without any proof to the contrary by "Dunhill", I still

miscellaneous services related to its provision of such rental equipment (for example, cartage, gas, dismantling, damage waiver fees, etc.), "Dunhill's" rental revenues amount to $37,382,182, during the same period it earned only slightly more than 2.9 million dollars from selling its rental property. Taxpayer Ex. 1, pp. 3, 5, 7, 9, 11 (sum of all accounts but those for, and following, the account heading of "Cartage"). Based on those comparative figures, it is clear that "Dunhill" does not rent the items in its rental fleet as a mere incident to its claimed intent to hold those items for resale to others. Rather, just the opposite is true. "Dunhill's" own exhibit shows that it sells the items in its rental fleet as an incident to its very profitable enterprise of renting such property. *See* 86 Ill. Admin. Code § 150.306(a)(2).

Perhaps the most critical fact when determining whether "Dunhill" subjected the equipment at issue to a "use" that makes it subject to Illinois use tax is the fact that "Dunhill" depreciated the equipment it purchased and placed in service as part of its rental fleet, and thus, did not carry such items – as retailers do – as part of its inventory of goods available for sale to others in Illinois. "Dunhill" did not and would not depreciate the equipment it purchased and held as part of its sales inventory. Tr. p. 62 ("Marino"); *see also* 26 C.F.R. § 1.167(a)-2.[5] It is "well-settled law that the Section 167 allowance

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conclude that "Dunhill" had, by the time any sales credits were given, already "first subjected [the items in its rental fleet] to the use for which [they were] purchased …." 35 **ILCS** 105/2.

[5] Treasury Regulation § 1.167(a)-1(a) provides, in part:

> (a) Reasonable Allowance. Section 167(a) provides that a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business or of property held by the taxpayer for the production of income shall be allowed as a depreciation deduction. The allowance is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the

for depreciation does not apply to inventory or stock in trade." Valmont Industries, Inc., 73 T.C. 2935, 2950 [Dec. 36,818] (1980); *see also*, Humphrey Cadillac & Olds v. Department of Revenue, 68 Ill. App. 3d 27, 385 N.E.2d 846 (2d Dist. 1979) (cars purchased by auto dealership and carried by dealership as inventory available for sale, and which were never depreciated, were entitled to interim use exemption from use tax).

"Dunhill" asserts, rightly, that it properly depreciated the equipment in its rental fleet. "Dunhill's" Brief, p. 12; *see also* 26 C.F.R. §§ 1.167(a)-1(a), (a)-2; [1994] 3 Stand. Fed. Tax Rep. (CCH) ¶ 11,004.01, at 25,521 (Property is depreciable if it (1) is used for business or held for the production of income; (2) has a determinable useful life exceeding one year; and (3) wears out, decays, becomes obsolete, or loses value from natural causes). Indeed, the Department does not dispute the propriety of "Dunhill's"

> property as provided in section 167(g) and §1.167(g)-1. An asset shall not be depreciated below a reasonable salvage value under any method of computing depreciation. However, see section 167(f) and §1.167(f)-1 for rules which permit a reduction in the amount of salvage value to be taken into account for certain personal property acquired after October 16, 1962. See also paragraph (c) of this section for definition of salvage. The allowance shall not reflect amounts representing a mere reduction in market value. * * * *

26 C.F.R. § 1.167(a)-1(a). Treasury Regulation § 1.167(a)-2 provides:

> The depreciation allowance in the case of tangible property applies only to that part of the property which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence. *The allowance does not apply to inventories or stock in trade***,** or to land apart from the improvements of physical development added to it. The allowance does not apply to natural resources which are subject to the allowance for depletion provided in section 611. No deduction for depreciation shall be allowed on automobiles or other vehicles used solely for pleasure, on a building used by the taxpayer solely as his residence, or on furniture or furnishings therein, personal effects, or clothing; but properties and costumes used exclusively in a business, such as a theatrical business, may be depreciated.

26 C.F.R. § 1.167(a)-2 (emphasis added).

depreciation of the equipment it purchased for use in its fleet of rental equipment. What the Department argues, instead, is that "Dunhill's" purposeful depreciation of such property is an act that is wholly inconsistent with "Dunhill's" fundamental premise at this hearing – that "Dunhill" did not really use the equipment at issue, but merely carried such property, as any retailer would, as part of its inventory of goods available for sale in the ordinary course of its retailing business. *See* Department's Brief, pp. 11-17; "Dunhill's" Brief, pp. 7-8.

"Dunhill" goes even further, however, and argues that since the property at issue was always available for sale during the period when "Dunhill" made the equipment available for lease to others, it does not matter that it depreciated such property. "Dunhill's" Brief, pp. 8-14 (and unnumbered pages included therein). "Dunhill" attaches to its brief certain public records regarding the regulatory history of use tax rule 306, and claims, in effect, that those records prove that when the Department wrote that rule, it intended that any person who purchased property for lease to others be entitled to the interim use exemption so long as the property was "otherwise available for sale" during the lease period. *See id.*

The public records "Dunhill" attached to its brief, however, do not support its argument. "Dunhill's" argument, moreover, proposes an interpretation of rule 306 that is wholly inconsistent with the text of § 2 of the UTA, as well as with Illinois judicial interpretations of that section, as it applies to persons whose regular business operations include leasing tangible personal property to others. Telco Leasing, Inc., 63 Ill. 2d at 310-11, 347 N.E.2d at 731; Howard Worthington, Inc., 96 Ill. App. 3d at 1135, 421 N.E.2d at 1032-33. Those decisions clearly stand for the proposition that persons who purchase

property to lease to others in Illinois are not included in the class of persons the legislature intended to be entitled to the interim use exemption. *Accord* 86 Ill. Admin. Code § 150.306(a)(2).

Taken as a whole, the pages of the public record attached to "Dunhill's" Brief reflect some of the work conducted by the Joint Committee on Administrative Rules ("JCAR"),[6] the administrative agency obliged, pursuant to the Illinois Administrative Procedures Act, to review administrative regulations before they are adopted by the proposing Illinois administrative agency. *See generally* 5 **ILCS** 100/5-90 to 5-125. "Dunhill" focuses on just one exchange included in those records, where JCAR asked the Department whether it "had criteria for determining whether property is 'otherwise available for sale?'" "Dunhill's" Brief, p. 10. "Dunhill" then misquotes the agency's response to that single question, by excluding the last paragraph of the response, and without any editorial indication that it was omitting some of that response. The paragraph of the Department's response that "Dunhill" left out provides:

* * * *

> In Humphrey Cadillac & Olds v. The Department of Revenue, 68 Ill. App. 3d 27, the court held that cars

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[6] The first four pages of the public records attached within "Dunhill's" Brief include the Department's second notice of proposed use tax rule 306 to JCAR, which was submitted to JCAR on or about March 1, 1984. "Dunhill's" Brief, pp. 9a-9b (and two other unnumbered pages). The next page is a copy of JCAR's acknowledgement of its receipt of that second notice. The next six pages include a March 7, 1984 cover letter from JCAR to the Director of the Department, JCAR's statement of "General Problems or Questions Concerning [the Department's] Proposed Rulemaking", and the Department's March 21, 1984 responses to those questions. "Dunhill's" Brief, pp. 9d-9f (and unnumbered pages contained therein). The next four pages include a statement of "Resolved Issues and Problems," which describes the Department's responses to JCAR's questions about the Department's second notice of the rule. "Dunhill's" Brief, pp. 9g (and three succeeding unnumbered pages). The last three pages attached within "Dunhill's" Brief include an April 10, 1984 letter from JCAR to the Director, which recaps the changes the Department agreed to make to its second notice of proposed use tax rule 306, and JCAR's certification that, following those agreed upon changes, it had no objection to the Department's proposed rule. "Dunhill's" Brief, pp. 9i (and unnumbered pages attached thereto).

> removed from an inventory account and placed in a rental account qualified for the interim use exemption primarily because they were treated as inventory available for sale at all times. Evidence that the cars were available for sale included a rapid turn-over of the cars, frequent sales of the cars to persons renting them, low gross receipts from the rental (in fact an actual loss) indicating that the rental activity was not engaged in primarily for profit. Factors such as these would be considered by the Department in determining if merchandise was held available for sale by a retailer.

Compare "Dunhill's" Brief, p. 9f *with id*., p. 10.

It's hard to read that last paragraph and not view "Dunhill's" decision to omit it from its blocked quote of "… the Department's response, written by the Deputy Director/General Counsel, …" as misleading. *See* "Dunhill's" Brief, p. 10. "Dunhill" quoted part of the Department's response to support the proposition that the Department had "recognized that rental equipment need not be in an inventory account and that an item in a lease account could qualify for interim use." *Id*. But the part of the Department's response that "Dunhill" omitted analyzed the type of circumstances under which the Department would agree that property being rented by a retailer might still be considered subject to the interim use exemption.

The facts described in the Department's JCAR analysis, however, are not present here. By eliminating the Department's description of the facts under which it might agree that property was being carried by a retailer as the property it was primarily engaged in the business of selling at retail, "Dunhill" avoided having to explain why it should receive benefit of the exemption even though the evidence at hearing revealed: (1) that, rather than rapidly turning over items in its rental fleet, it made such items available for rental to others for, on average, between three to four years; (2) no evidence to show

how often "Dunhill" may have sold rental items (or new equipment) as a direct result of a demonstration rental to others; or (3) that "Dunhill's" rental of the items purchased for use in its rental fleet produced almost half of its annual revenues.

"Dunhill" also wholly ignores the Department's responses to JCAR's questions about the interplay of the two paragraphs in rule 306(a). *See* "Dunhill's" Brief, p. 10. For example, in its question number 6, JCAR posed the following question to the Department, and the Department gave the following answer:

> Q: Section 150.306(a)(1) states that in order to qualify for the interim use exemption, property used by the retailer or his agents must be "carried as inventory on the books of the retailer" or be "otherwise available for sale during the interim use period." Section 150.306(a)(2) [as proposed] states that in order to qualify for the interim use exemption, property which is leased must be "available for sale during the lease period." Would the Department explain whether the absence of "carried as inventory on the books of the retailer" from Section 150.306(a)(2) indicates a different standard from that indicated in Section 150.306(a)(1)?
>
> A: No different standard is implied. The Department will agree to include the phrase "carried on the books of the retailer or".

"Dunhill's" Brief, pp. 9e-9g; *see also id*. (JCAR's questions 4 and 5, and the Department's response thereto).

Finally, "Dunhill" refers to the changes the Department agreed to make to the text of proposed rule 306 (a)(2), and following JCAR's request, as an "afterthought" (*see* "Dunhill's" Brief, p. 10), without accepting the more proper understanding of the role JCAR plays. Rather than viewing the Department's agreed changes to § 306(a)(2) as an afterthought, I conclude that the Department changed the draft of its second notice of proposed use tax rule 306 because JCAR's questions, the process of responding to them,

and JCAR's hearing process, taken together, helped the Department recognize that the rule as submitted contained ambiguities. The Department's response to JCAR's question number 6 clearly indicates that the agency did not intend the words "otherwise available for sale", as used in the first sentence in proposed rule 306(a)(2), to set forth a different standard than the one expressed in subparagraph (a)(1) of the rule. Because it did not intend a different standard to apply, it agreed to include the phrase "carried as inventory on the books of the retailer" in subparagraph (a)(2). *See* "Dunhill's" Brief, pp. 9e-9g.

"Dunhill's" proposed interpretation of use tax rule 306 is also contrary to judicial interpretations of § 2 of the UTA, as both are intended to apply to persons whose regular business operations include leasing tangible personal property to others in Illinois. Specifically, "Dunhill" argues that "[t]he view that a taxpayer's depreciation of leased property is fatal to qualification for the interim use exclusion is not consistent with the Use Tax Act." "Dunhill's" Brief, p. 12. That statement, however, seems to suggest that the class of persons to whom the interim use exemption was intended to apply includes any lessor who places a "for sale" sign over the tangible personal property it rents to others in the ordinary course of its rental or leasing business. It is that view that is inconsistent with the § 2 of the UTA. *See* Telco Leasing, Inc., 63 Ill. 2d at 310-11, 347 N.E.2d at 731; Philco Corp., 40 Ill. 2d at 317, 239 N.E.2d at 809. It is also inconsistent with the two Illinois cases that have addressed the interim use exemption and depreciation.

In L & L Sales & Services, Inc., 68 Ill. App. 3d at 332, 385 N.E.2d at 927-28, expressly held that a "[taxpayer's] practice of accounting for the equipment as inventory *and not depreciating it* is consistent with a continued intent to ultimately sell it at retail."

(emphasis added) Similarly, in Humphrey Cadillac and Olds, Inc. v. Department of Revenue, 68 Ill. App. 3d 27, 29, 385 N.E.2d 846, 848 (2d Dist. 1979), the appellate court held that cars purchased by a dealership and placed into a rental account, "were purchased for the purpose of resale, and that the [dealership's] transitional use of the cars for rental, courtesy and demonstration was merely incidental." The appellate court came to that conclusion after agreeing with the circuit court that the Department's administrative decision had been based on a Department auditor's determination that Humphrey's books and records showed that the property at issue "appeared to be depreciat[ed]." Humphrey Cadillac, 68 Ill. App. 3d at 28, 385 N.E.2d at 846. The record, however, showed that the auditor had indeed "misdescribed" the entries in Humphrey's books and records, because those records actually showed that all of the cars in its sales inventory had been subjected to the same charge, which was made to reflect the current market value of the vehicles. Humphrey Cadillac, 68 Ill. App. 3d at 28, 385 N.E.2d at 847; *see also*, 26 C.F.R. § 1.167(a)-1(a) (the allowance for depreciation "shall not reflect amounts representing a mere reduction in market value.") (*quoted supra*, pp. 23-24 n.5). Thus, in Humphrey, the court's conclusion that the cars were entitled to the interim use exemption simply cannot be divorced from the fact that the taxpayer *had not taken* a depreciation deduction for the property at issue. Here, however, there is no dispute that the items placed in service in "Dunhill's" rental fleet *were* depreciated. *See* Department Ex. 6, p. 7; Tr. p. 62 (Marino).

The fact that the courts in Humphrey Cadillac and L & L Sales felt compelled to address the fact (or the claim) that the property at issue was (or was not) depreciated flies in the face of "Dunhill's" argument that the depreciation is immaterial to a determination

of use or interim use. Depreciation is relevant and material to an interim use question because only retailers are entitled to claim an interim use for the property they are primarily in the business of selling in the first place (35 **ILCS** 105/2), and because retailers, as a matter of law (26 C.F.R. § 1.167(a)-2), are not entitled to claim depreciation on the items of tangible personal property they purchase and include within their inventory of goods available for resale, or as their stock in trade.

Persons engaged in the business of leasing or renting property to others, in contrast, are able to claim the deduction for depreciation on the property they rent to others, because, like "Dunhill", such persons use the property in their business operations, or for the production of income – even if such property is also available for sale. 26 C.F.R. §§ 1.167(a)-2, 1.167(a)-11(e); *see also*, Rev. Rul. 95-52, 1995-2 C.B. 27 (the IRS treats "rent-to-own contracts … as leases (not as sales) for federal income tax purposes", thus allowing rent-to-own dealers to depreciate the property they rent, even though it is always available for sale to others); Rev. Proc. 95-38, 1995-2 C.B. 397 (describing "rent-to-own contracts"). But again, the reason why such property is depreciable is because the owner is using the property for the production of income, not because it is available for sale. 26 C.F.R. §§ 1.167(a)-2, 1.167(a)-11(e); *see also*, Tr. p. 62 (Marino) ("… the principle of depreciation is to allocate the cost of the tangible assets to the periods in which the revenue is being generated [by those assets]").

Since depreciation of an item of tangible personal property is an act which is legally inconsistent with a taxpayer's argument that the property was purchased and held primarily for resale to others in the ordinary course of its retailing business, a taxpayer's purposeful depreciation of such property acts as a tacit admission that it has "used" the

property in its business, or for the production of income. *See* 26 C.F.R. §§ 1.167(a)-2, 1.167(a)-11(e)); 35 **ILCS** 105/2. As the definition of "placed in service" reflects, once a taxpayer claims benefit of a depreciation deduction for an item of tangible personal property, it has begun to make the property being depreciated "… availab[le] for a specifically assigned function …." 26 C.F.R. § 1.167(a)-11(e). The specifically assigned function for which "Dunhill" placed the wide-ranging number and types of construction equipment into service within its rental fleet, was the production of rental revenue. *See* Taxpayer Ex. 1, 3, 5, 7, 9, 11; Department Ex. 6, pp. 7-8.

Finally, "Dunhill's" fundamental argument is that it was a retailer and that "its intent was always to resell the equipment" in its rental fleet. "Dunhill's" Brief, p. 7. That argument, however, completely ignores the scope and financial effect of "Dunhill's" own considerable rental operation, and the different way it treated the property held within its sales inventory versus the way it treated the property purchased for use in its rental fleet. To find "Dunhill's" stated intent more compelling than the facts reasonably drawn from "Dunhill's" books and records, I would have to conclude that "Dunhill" purchased the equipment at issue because it really wanted to earn 2.9 million dollars from selling such property, and not because it wanted to earn 37 to 41 million dollars from renting it. I cannot and do not make that conclusion. Instead, the evidence shows, and I make as a conclusion of fact, that "Dunhill" purchased the equipment at issue, and placed it into service in its rental fleet, for the very rational purpose of making a profit by renting it to others in the ordinary course of its rental business. Taxpayer Exs. 1-2; Tr. p. 27 ("Wayne"); Telco Leasing Inc., 63 Ill. 2d at 310-11, 347 N.E.2d at 731; *see also*, Department Ex. 6, p. 8 ("Due to the short time that the equipment remained in sales

inventory, it was obvious that the Taxpayer purchased the equipment with the intent to rent it and not to sell it."). Since "Dunhill" subjects the equipment placed in service in its rental fleet to the use for which it was originally purchased, it is not treating the property at issue as would a member of the class to whom the interim or demonstration use exemption was intended to apply. 35 **ILCS** 105/2.

Even if "Dunhill" eventually intended to sell the equipment it purchased during the claim period and put into its rental fleet, the documentary evidence drawn from "Dunhill's" books and records shows that "Dunhill" first exercised power and control over that property by making it available for rental to customers in Illinois. That exercise, incident to "Dunhill's" ownership of the equipment, is a use of such property. 35 **ILCS** 105/2; Telco Leasing, Inc., 63 Ill. 2d at 310-11, 347 N.E.2d at 731. I conclude, therefore, that "Dunhill" was primarily a lessor of the equipment at issue, that it used that equipment by making it available for rental to others in Illinois, and that its use of that equipment is not exempt from use tax.

Issue 2: Whether Illinois' Taxpayer's Bill of Rights Requires the Department to Abate Tax Assessed Against "Dunhill" Regarding Its Purchases of Equipment, During the Months of 4/9 through 12/95, for Use in Its Rental Fleet

Section 4 of the Illinois Taxpayer's Bill of Right Act ("TBRA") provides that "… to protect the rights of taxpayers …" the Department has the power and duty: "[t]o abate taxes and penalties assessed based upon erroneous written information or advice given by the Department." 20 **ILCS** 2520/4. The Illinois General Assembly enacted the TBRA "to place guarantees in Illinois law to ensure that the rights, privacy, and property of Illinois taxpayers are adequately protected during the process of the assessment and collection of

taxes." 20 **ILCS** 2520/2 (Legislative Direction). The legislature also intended to "to promote improved taxpayer self-assessment by improving the clarity of tax laws and efforts to inform the public of the proper application of those laws." *Id*.

Even if "Dunhill" properly owes use tax on its purchases and use of the property at issue here, the TBRA forms an independent basis for granting "Dunhill's" claims for refund, to the extent that the tax it paid was "… based upon erroneous written information or advice given by the Department." 20 **ILCS** 2520/4; McLean v. Department of Revenue, 184 Ill. 2d 341, 704 N.E.2d 352 (1998). "Dunhill" argues that it was. "Dunhill's" Brief, p. 14 ("… "Dunhill's" failure to pay Use Tax was based upon erroneous written advice of the Department."); *see also* Taxpayer Exs. 3, 5-6.

In response, the Department argues the TBRA does not require abatement here. First, the Department argues that "Audit Supervisor's" 7/9/92 letter "relied upon facts that the audit determined to be inaccurate, i.e., that sales income exceeded rental income." Department's Brief, p. 23. The Department also contends that "Audit Supervisor's" letter "was based on a Department employee's interpretation of information supplied by the taxpayer at issue that was itself factually erroneous and incomplete." *Id*. Neither of those arguments, however, is supported by the facts of record.

The basis for "Audit Supervisor's" letter is clearly identified in the letter itself. Specifically, [her] "… conclu[sion] …" was "[b]ased upon the information provided in ["Wayne's"] letter …." Taxpayer Ex. 6. "Wayne's" letter to "Audit Supervisor", however, does not contain any false or misleading statements of fact regarding its business. Taxpayer Ex. 5. "Wayne's" letter, in particular, does not discuss "Dunhill's"

revenues from either selling or renting equipment. *Id*. Nor can there be any dispute that "Dunhill" really did hold out that the items in its rental fleet were available for sale during the period they were placed in service within "Dunhill's" rental fleet. *See* Department Ex. 4, p. 1 (bottom). Finally, "Wayne's" statement that "[t]he interim use exemption will apply to … [rental] equipment [costing greater than $1000]" is a conclusion, not a statement of fact, and a conclusion "Wayne" was asking "Audit Supervisor" to confirm. *Id*. She did, but her confirmation was erroneous. Thus, the facts of this case do not support the Department's argument that "Dunhill" somehow misled the Department or "Audit Supervisor" about the facts of its business, thus tricking her into writing the July 1992 letter. *See* Department's Brief, p. 24 (*citing* Safety-Kleen Aviation, Inc. v. Zehnder, No. 96 L 50840 (Cook Co. Cir. Ct., December 30, 1997)). "Audit Supervisor's" letter simply cannot be blamed on any alleged material misstatements of fact made by "Dunhill".

The Department further argues that "Audit Supervisor's" letter "did not grant the exemption, nor did it have the power to grant the exemption." Department's Brief, p. 23. True, but that only describes why the conclusion set forth in [the] letter was erroneous. [The] letter stated, "… we conclude that a vast amount of purchases on which use tax has been paid to the Department would qualify for interim/demonstration use." Taxpayer Ex. 6. If a Department employee writes to a taxpayer and informs that taxpayer that it is (or would be) entitled to an exemption to which it is not entitled, the writing contains erroneous information or advice. Moreover, [the] letter was written at the conclusion of an audit during the course of which the issue of "Dunhill's" entitlement to the interim use exemption was specifically addressed. *See* Taxpayer Exs. 5-6, 8.

Most importantly, based on the erroneous written information included in "Audit Supervisor's" letter, "Dunhill" stopped paying use tax regarding the items of construction equipment that it had purchased for use within its rental fleet. Prior to [the] letter, "Dunhill" had been paying tax on such property, albeit 18 months after purchasing that property. Department Ex. 6, pp. 6-8; Taxpayer Exs. 2-3; Tr. pp. 38-40, 48-49 ("Wayne"). As "Wayne" testified at hearing, had [the] letter notified "Dunhill" that its rental equipment was not entitled to the interim use exemption, it would have continued to self-assess use tax on such purchases, and pass along the cost to its rental customers. *See* Tr. p. 49 ("Wayne").

The Department next argues that the Illinois supreme court's recent decision in McLean v. Department of Revenue, 184 Ill. 2d 341, 704 N.E.2d 352 (1998), should not be read to support any abatement here, because McLean involved an assessment of tax and not a claim for credit. Department's Brief, p. 23. But in this case, "Dunhill" *was* assessed tax. Tr. pp. 48 ("Wayne"), 73-74 ("Auditor 2"). It paid that assessment of use tax, presumably to stop the running of interest, and then filed a claim for credit to challenge the propriety of the assessment. *See* Department Ex. 1. I do not read the text of § 4 of the TBRA, or the Illinois supreme court's opinion in McLean, to mean that a taxpayer who challenges a tax assessment by paying it, then timely files a claim for refund of that tax paid, somehow loses the protections the TBRA gives to other taxpayers.

Finally, the Department argues that extending the TBRA to "Dunhill" here would be contrary to well established tax principles, among them the principle that the Department cannot be estopped by the mistakes and errors of its officers and employees

from collecting taxes legally due. Department's Brief, p. 23 (citing Austin Liquor Mart v. Department of Revenue, 51 Ill. 2d 1, 5, 280 N.E.2d 437, 439 (1972)). That is not a principle of tax law, however. Rather, it is a principle associated with the equitable remedy of estoppel, and it is invoked when a person asks a court to prohibit the state from undertaking an otherwise lawful enforcement action, due to some alleged error by a state actor. To the extent that a Department employee's mistake is not manifested by written advice or information, that fundamental principle was not affected by the enactment of the TBRA.

But the TBRA clearly changed that common law principle where a Department employee's mistake or error involves his tender of erroneous written information or advice to a taxpayer, and the taxpayer, in reliance of that information, acts upon it. 20 **ILCS** 2520/2, 4. The taxpayer may use his reliance on that written information as a shield against a subsequent assessment of tax regarding the transactions that were the subject of the erroneous written advice or information. *See* McLean, 184 Ill. 2d at 347, 363-64, 704 N.E.2d at 356, 363-64.[7] I presume, as I must, that the Illinois General Assembly knew about the estoppel principle announced in Austin Liquor Mart, and it clearly intended to change the effect of that rule under the circumstances described in § 4

[7] The court in McLean early noted the Department's administrative finding that, "in determining his tax liability during the relevant tax years, [McLean] relied upon two of the Department's official, explanatory publications – namely a departmental release dated May 1, 1990, and 'Informational Bulletin FY 91-49' dated April 1, 1991." McLean, 184 Ill. 2d at 347, 704 N.E.2d at 356. While the McLean court did not expressly hold as such, the legislative intent expressed in § 2 of the TBRA strongly suggests that the Act was intended to create a shield, and not a sword, for taxpayers who, in good faith, rely on the erroneous written advice or information of the Department. In that regard, I agree with the Department's argument that a taxpayer that knowingly misrepresents material facts when asking for a private letter ruling should not be understood as being included within the class of taxpayers intended to be protected by the TBRA. The TBRA was passed to protect taxpayers, not to reward those who mislead by disclosing only some of the material facts of their income producing activities. But again, the facts adduced at

of the TBRA.

The audit supervisor's 7/8/92 letter to "Wayne" and "Dunhill" clearly contained erroneous written advice. That advice was given during an audit of "Dunhill's" business, after the Department's auditor told "Dunhill" that the written advice previously given to "Dunhill" by the Department (i.e., the private letter ruling regarding the 18 month "safe harbor" rule, Taxpayer Ex. 3) was no longer sound. "Audit Supervisor's" letter was written and given in response to "Dunhill's" specific written request for information as to how it should file its Illinois sales and use tax returns in the future. Taxpayer Ex. 5. Based on the written response of the Department audit supervisor, "Dunhill" stopped self-assessing the use tax it had been paying (albeit 18 months late), for the equipment it purchased and placed in service as part of its rental fleet. Tr. pp. 48-49 ("Wayne"); *see also* Department Ex. 1.

Approximately 27 months after "Dunhill" relied on the Department's written advice to its detriment, the Department determined, correctly, that the equipment "Dunhill" purchased and placed in service as part of its rental fleet was being used in "Dunhill's" leasing enterprise, that that use was not an interim use, and that "Dunhill" should be self-assessing and paying use tax regarding those purchases. Department Ex. 6, pp. 4-11. The Department communicated that determination to "Dunhill", in writing, via the audit report and supporting schedules, on October 17, 1994. Department Ex. 6, pp. 1-3; *see also id.*, p. 9. "Wayne" signed that audit report on "Dunhill's" behalf. Department Ex. 6, p. 1. On the date "Wayne" signed that audit report, "Dunhill" also withdrew its amended returns for the period from 7/88 through 3/91, which had sought refund of

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this hearing do not warrant a conclusion that "Dunhill" duped "Audit Supervisor" into writing her July 1992 letter.

approximately $700,000 of use tax. *Id*., p. 3.

Despite the fact that he signed the audit report and the statement pursuant to which "Dunhill" withdrew the amended returns it had filed seeking refund of almost $700,000 for its purchases during the months of 7/88 through 3/91, "Wayne" testified at hearing that, after the Department audited "Dunhill's" amended returns, he understood that "Dunhill" was "still eligible for interim use …." Tr. p. 46, *see also id*. pp. 47-48. That testimony is incredible. If "Wayne" really believed that "Dunhill" was entitled to a refund of approximately $700,000 of the use tax it paid regarding the items of equipment it purchased for use in its rental fleet, then why did he withdraw "Dunhill's" amended returns for the significantly smaller sum of $162,000 – especially when the audit report "Wayne" signed clearly revealed that only $23,000 of the amount refunded was a refund of use tax? *See* Department Ex. 6, pp. 1-3.

"Wayne" is a CPA who was "Dunhill's" controller in 1994 (*see id*., p. 1), and he was the company's chief financial officer when he testified at hearing. Tr. pp. 22-23 ("Wayne"). It is extremely difficult for me to accept that a person of "Wayne's" education and experience could sign the audit report that was admitted as evidence at hearing and still believe that the Department had concluded that "Dunhill" was entitled to the interim use exemption for the equipment regarding which "Dunhill" had filed claims for refund. *See* Department Ex. 6, pp. 1-3. Rather, I view "Wayne's" withdrawal of "Dunhill's" earlier amended returns as evidence that, on October 17, 1994, "Wayne" had accepted the Department's determination that "Dunhill" was not entitled to the interim use exemption for the equipment placed in service within "Dunhill's" rental fleet. *See* Department Ex. 6, pp. 1-3, 9. "Wayne" accepted the Department's audit determination,

more likely than not, because "Wayne" knew that "Dunhill" purchased the property at issue primarily for use in its rental fleet. *See* Department Ex. 6, p. 8 (in his audit comments prepared to describe the audit of "Dunhill's" claims for the period from 7/88 to 3/91, "Auditor 2" wrote, "In conversations with Mr. Bruce "Wayne", Controller, he also stated that they knew the equipment was being purchased for rental purposes at the time of purchase.").[8]

The claim period at issue in this matter began on April 4, 1991 and ended on December 31, 1995. That is the same audit period for which the Department assessed tax, and which "Dunhill" paid. While I conclude that "Dunhill" has introduced documentary evidence sufficient to show that it is entitled to relief under the TBRA, not all of the tax "Dunhill" paid regarding the audit period at issue here should be abated. Beginning October 17, 1994, "Dunhill" could no longer claim reasonable reliance on

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[8] Counsel for "Dunhill" objected to the admission of the pages of Department Ex. 6 that included the auditor's comments, on the basis that the comments included hearsay. Tr. p. 90. The whole exhibit was admitted over counsel's objection. Tr. p. 92; 35 **ILCS** 120/8; 35 **ILCS** 105/12. To the extent that "Auditor 2"'s description of "Wayne's" statement to him formed the basis of counsel's hearsay argument, the statement was admissible as an exception to the hearsay rule. Specifically, the comments included a statement of "Dunhill's" employee, which statement was made during the scope of his employment and about a subject on which "Wayne" was authorized to speak, and that statement is inconsistent with "Dunhill's" position at hearing. Quincy Trading Post v. Department of Revenue, 12 Ill. App. 3d 725, 731-32, 298 N.E.2d 789, 794 (4th Dist. 1973).

To the extent that "Dunhill's" hearsay objection to "Auditor 2"'s audit comments was based on "Auditor 2"'s written description of how the audit was conducted, including his description of the content of "Dunhill's" books and records, "[a] statement that is hearsay is not admissible unless the statement satisfies an exception to the rule against hearsay recognized by the common law of Illinois or an exception provided by statute." M. Graham, Cleary & Graham's Handbook of Illinois Evid. § 801.1 at 633 (6th ed. 1994). Section 8 of the ROTA, which is incorporated into the UTA, is such a statutory exception, at least as applied to the "books, papers, records and memoranda of the Department …." 35 **ILCS** 120/8; 35 **ILCS** 105/12. Additionally, "Dunhill" had the opportunity to cross-examine the maker of the audit comments. *See* Tr. pp. 67-108 ("Auditor 2"). It also had the best opportunity to correct any mistakes "Auditor 2" might have made when describing the content of "Dunhill"s books and records in his comments, by offering the records themselves. *See* A.R. Barnes & Co., 173 Ill. App. 3d at 832, 527 N.E.2d at 1052.

"Audit Supervisor's" July 8, 1992 letter. McLean, 184 Ill. 2d at 363-64, 704 N.E.2d at 363-64.

Before I identify how "Dunhill's" TBRA remedy should be calculated, it is important to recall how a taxpayer is required to report its taxable purchases of tangible personal property for use in Illinois. Generally, such transactions are to be reported on the taxpayer's monthly sales and use tax returns, unless the purchase is required to be reported on a transaction by transaction basis (e.g., for motor vehicles, watercraft and aircraft required to be registered in Illinois). *See* 35 **ILCS** 120/3; 35 **ILCS** 105/12. Where monthly sales and use tax returns are appropriate, they are due to be filed on the twentieth day of the month following the month regarding which taxable gross receipts are received (or taxable purchases for use in Illinois are made). 35 **ILCS** 120/3. Here, "Dunhill" was given written notice, in the middle of October 1994, that its purchases of equipment for use in its rental fleet were subject to use tax. Department Ex. 6, pp. 1-3, 9; Tr. pp. 107-08 ("Auditor 2"). Thus, "Dunhill" must be held to have known, on that same day, that it was required to report all of the taxable purchases of tangible personal property it made during the month of October 1994 on the monthly return that was due on November 20, 1994. I recommend, therefore, that the Director abate all amounts of use tax previously assessed and paid regarding "Dunhill's" purchases of the equipment at issue during the months beginning 4/1/91 through 9/31/94.

The amount of the abatement to which "Dunhill" is entitled under the TBRA should be computed in the following manner. First, "Dunhill's" cost price of equipment (costing in excess of $1,000) purchased during the period from 4/1/91 through 9/31/94, which equipment was placed in service in its rental fleet, should be calculated. Then, that

dollar amount should be multiplied by the applicable use tax rate. That amount of tax, plus statutory interest, should then be subtracted from the amount of tax "Dunhill" paid, taking into account any reductions the Department has already made. *See* Tr. pp. 19-21.

Conclusion

"Dunhill" has not rebutted the *prima facie* correctness of the Department's determination to deny "Dunhill's" claim for refund of the use tax it paid regarding its purchases of equipment placed in service as part of its rental fleet. "Dunhill" purchased the property at issue primarily to use it by making it available for rental to others in Illinois, and it sold such equipment only as an incident to its leasing activity. *See* Taxpayer Ex. 1, pp. 1, 3, 5, 7, 9, 11; Telco Leasing, Inc., 63 Ill. 2d at 310-11, 347 N.E.2d at 731; Howard Worthington, Inc., 96 Ill. App. 3d at 1135, 421 N.E.2d at 1032-33; 86 Ill. Admin. Code § 150.306(a)(1).

Notwithstanding that conclusion, the amounts of use tax that the Department previously assessed regarding ABC's" purchases of equipment during the months of 4/1/91 through 9/31/94 (and/or "Dunhill's" purchases during the months of 4/91 and 5/91), which "Dunhill" placed in service within its rental fleet, should be abated. That abatement is not required because the items at issue were exempt from use tax. *See* 35 **ILCS** 105/2. Rather, it is because "Dunhill's" nonpayment of the use tax that was lawfully owed was caused by "Dunhill's" reliance on the erroneous written information or advice of the Department. Taxpayer Exs. 5-6; 20 **ILCS** 2520/4; McLean, 184 Ill. 2d at 347, 363-64, 704 N.E.2d at 356, 363-64.

I recommend therefore, that the Director cancel the Notice of Denial issued to "Dunhill" for the months of 4/91 and 5/91, and grant those claims. I recommend that the

Director revise the Denial issued to ABC" as described in this recommendation, so as to grant some of its claims as required by the TBRA, and finalize that Denial as so revised.

9/1/2000 _____

Administrative Law Judge